FOR ARGUMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner

v.

FRANCES B. DAVIS,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AS AMICI CURIAE OF

AMERICAN COALITION OF CITIZENS WITH DISABILITIES
AMERICAN COUNCIL OF THE BLIND
DISABLED IN ACTION OF NEW JERSEY
DISABLED IN ACTION OF PENNSYLVANIA
DISABLED IN ACTION OF BALTIMORE
EPILEPSY FOUNDATION OF AMERICA
NATIONAL ASSOCIATION FOR RETARDED CITIZENS
NATIONAL CONGRESS OF ORGANIZATIONS OF THE PHYSICALLY HANDICAPPED
PARALYZED VETERANS OF AMERICA
UNITED CEREBRAL PALSY ASSOCIATIONS
NATIONAL COUNCIL OF SENIOR CITIZENS
NATIONAL PROTECTION AND ADVOCACY COORDINATING COMMITTEE
DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK OF PENNSYLVANIA

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NATIONAL PROTECTION AND ADVOCACY COORDINATING COMMITTEE
DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK OF PENNSYLVANIA

INTEREST OF AMICI

This amicus brief is filed pursuant to Rule 42(2) with the consent of both parties.

Amici American Coalition of Citizens with Disabilities, American Council of the Blind, Disabled In Action of New Jersey, Pennsylvania and Baltimore, Epilepsy Foundation of

America, National Association for Retarded Citizens, National Congress of Organizations of the Physically Handicapped, Paralyzed Veterans of America and United Cerebral Palsy Association are all organizations of and for disabled people. The National Council of Senior Citizens includes many disabled persons among its members. These organizations have chapters and affiliates in every state in the United States. Together they represent well over ten million persons with disabilities.

Amicus National Protection and Advocacy Coordinating Committee represents the directors of the state agencies officially designated by the Governor of each state to protect and advocate the rights of disabled persons. *Amicus* Developmental Disabilities Advocacy Network of Pennsylvania is the official protection and advocacy agency in Pennsylvania.

The efficacy, or not, of Title V of the Rehabilitation Act of 1973 will determine in significant part the opportunities of the disabled members of these organizations to participate fully and freely in the life of this society and enjoy their citizenship. For many decades amici organizations and their members have worked to discover and to supply the necessary conditions for a full and free life by disabled people. They have sought to bring all people to recognize the competences of people who are disabled, to replace historical but confining and defeating stereotypes with respect and appreciation, and to render effective the "present determination"[1] of disabled people to take an equal place in society. Each of amici organizations has contributed to the understanding of the Congress and its resolution in Title V of the Rehabilitation Act of 1973—including particularly Section 504—and related statutes enacted between 1968 and 1975 to charter a new status and a new life for disabled people. Each has worked to implement and to enforce Section 504 and to make its promises real, by assisting recipients of federal financial assistance in self-evaluations and in developing transition and remedial plans, as provided in the Section 504 Regulation, 45

1. Statement of the Director of Nursing Services, Southeastern General Hospital. (App. 140a).

C.F.R. Section 86.6(c) and Section 84.22(e), and by invoking administrative and judicial remedies. Seven of these organizations participated as amici in *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977) and in *United Handicapped Federation v. Andre*, 558 F. 2d 413 (8th Cir. 1977); three participated as amici in the Third Circuit's pending consideration of *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977).

Amicus *American Coalition of Citizens with Disabilities* was founded in 1974 to secure and enforce the civil and human rights of all people with physical or mental disabilities and obtain for its members the education and employment opportunities that make those rights real. Forty-two percent of the disabled working age population are employed (as compared to 74 percent of non-disabled). Only 14 percent of the severely disabled are employed.[2] Nine million disabled people are not employed. While many of them are determined to work, they have been denied the opportunity for education and training prerequisite to meaningful vocation and have been refused the accommodation and modification necessary to free their capacity.

Amicus *American Council of the Blind* is a national membership organization committed to securing and enforcing the civil rights of blind and otherwise handicapped person. For the last seven years the American Council for the Blind has actively worked for enforcement of Section 504 so that its members would not be excluded from higher education or limited in their educational and vocational pursuits.

Amici *Disabled In Action of New Jersey, Disabled In Action of Pennsylvania,* and *Disabled In Action of Baltimore,* are associations of physically disabled people and non-disabled people many of whom, despite their determination to advance, have been excluded from the work force or are only marginally

2. Statement of Assistant Secretary of Labor Donald Elisburg to the House Committee on Education and Labor, H. R. Rep. 1149, 95th Cong., 2d Sess. 24, 1978 U.S. Code Cong. & Admin. News 7513.

employed. The associations share among their purposes the elimination of discriminatory practices against disabled persons in education, employment, housing, and transportation and the enforcement of Section 504 to secure those necessities of life.

Amicus *Epilepsy Foundation of America* was founded in 1968 to advance the interests of Americans with epilepsy through research, vocational programs, legal advocacy and public education programs. The Epilepsy Foundation of America has a long standing commitment to secure and enforce the civil rights of persons with epilepsy and to eliminate the stereotypes and prejudices which serve to exclude persons with epilepsy from education and employment.

Amicus *National Association for Retarded Citizens,* organized in 1950, is a national voluntary organization devoted to improving the welfare of all mentally retarded children and adults. Among the Association's purposes is the realization of vocational, educational, social and personal opportunities for retarded citizens, in the most integrated, least separate community setting, and the enforcement of Section 504 and related legislation to those ends.

Amicus *National Congress of Organizations of the Physically Handicapped, Inc.* is a national coalition of the physically handicapped and their organizations, founded in 1958. The National Congress has among its purposes to secure the education and employment opportunities physically handicapped persons have been denied and to enforce Section 504 and related legislation to enable its members to lead full and productive lives.

Amicus *Paralyzed Veterans of America, Inc.* is a non-profit corporation founded in 1946 and chartered by the United States Congress, 85 Stat. 317. Its ten thousand members are veterans of the United States Armed Services in World War II, the Korean War, and Vietnam. Eighty-seven percent of paralyzed veterans in this country are unemployed. The Paralyzed Veterans of America is determined to eliminate the barriers and ex-

clusionary practices which restrict the ability of spinal cord injured persons to participate in occupations, and to engage in other activities available to all Americans.

Amicus *United Cerebral Palsy Associations* (UCPA), founded in 1948, is a nation-wide network of voluntary community agencies serving the lifetime needs of children and adults with cerebral palsy and their families. Among the association's purposes are the prevention of cerebral palsy; the promotion of the educational, social and physical well-being of persons with cerebral palsy and other developmental disabilities; the elimination of barriers and discriminatory practices which exclude persons with cerebral palsy from education and employment. Like other amici organizations UCPA has members who through sheer determination have made the most of limited opportunities and participate fully in the life of the community. However, many more are denied the education and occupations for which they are qualified and some are completely excluded from their community. See *Halderman v. Pennhurst,* 446 F.Supp. 1295 (E.D. Pa. 1977). UCPA seeks to enforce 504 and other related statutes to end this inequality.

Amicus *National Council of Senior Citizens, Inc.* is a non-profit corporation founded in 1961 to advance the health and social welfare of elderly persons. It has a membership of 3,500 clubs representing three and one-half million individuals, the great majority of whom are retired persons. Many members are disabled. Like other amici, the Council also has an interest in the enhancement of the quality and responsiveness of medical services which will ensue from the insightful participation of people with hearing disabilities in the delivery of medical services. Compare *Davis v. Southeastern Community College,* 574 F.2d 1158, 1161 n.6 (4th Cir. 1978).

Amicus *National Protection and Advocacy Coordinating Committee* is a national organization of the directors of the Protection and Advocacy agencies in all of the fifty states, the District of Columbia, Puerto Rico and the territories. The Congress, in the Developmentally Disabled Assistance and Bill of

Rights Act, 42 U.S.C. Section 6001, mandated that each state establish "a system to protect and advocate the rights of persons with developmental disabilities" with "the authority to pursue legal, administrative and other appropriate remedies" on behalf of the developmentally disabled. 42 U.S.C. Section 6012. See, *Naughton v. Bevilacqua,* 458 F.Supp. 610, 616 (D.R.I. 1978), granting intervention to the agency appointed by the Governor of Rhode Island, the Rhode Island Protection and Advocacy System Inc., an agency "whose insight into the problems and statutory protection of the developmentally disabled has already proved valuable. . ."

In each state the Governor has designated a Protection and Advocacy agency. Section 504 has been the central, crucial instrument to the Protection and Advocacy Systems. Were it vitiated the Protection and Advocacy Systems would be substantially diminished in their ability to discharge their assigned task. If its efficacy is sustained then they may be about their business.[3]

---

3. That business, its importance and its accomplishment was described by Senator Kennedy (Mass.) during Senate floor debate on the 1978 Amendments to the Rehabilitation Act and Developmental Disabilities Act:

> . . . the establishment of a protection and advocacy system for the developmentally disabled in 1975 marked a major advance in the movement to assure that the human and legal rights of all developmentally disabled persons would be secured.
>
> The P.&A. system was developed after careful and extensive congressional review of outrageous violations of the rights of the developmentally disabled. Names like Forest Haven and Willowbrook still conjure in one's mind the grossest form of human rights violations.
>
> . . . I do not know how many times we have had television documentaries on Willowbrook, and Forest Haven, and other institutions in this Nation, and still nothing gets done.
>
> Everyone in here knows that the only way that change is going to be brought about is the long, difficult, persistent, and dedicated advocacy . . . through administrative hearings . . . in the courts . . . that is the way it is done.
>
> 124 *Cong. Rec.* S15663 (Sept. 21, 1978)

Amicus *Developmental Disabilities Advocacy Network of Pennsylvania* is the Protection and Advocacy agency in the Commonwealth of Pennsylvania established pursuant to 42 U.S.C. Section 6012. Founded and formed independently in April 1977 by the Pennsylvania Chapter, National Society for Autistic Children, Pennsylvania Association for Retarded Citizens, Pennsylvania Association for Children with Learning Disabilities, United Cerebral Palsy Association of Pennsylvania, and Epilepsy Foundation of America, Pennsylvania Chapter, it was designated by the Governor of Pennsylvania as the Protection and Advocacy agency in July 1977. The Developmental Disabilities Advocacy Network has engaged in individual advocacy and legal advocacy to secure for developmentally disabled children and adults the education, training, and community services which they are entitled under state and federal law which in Pennsylvania they are still denied. *Halderman v. Pennhurst,* 446 F.Supp. 1295 (E.D. Pa. 1977). Like all Protection and Advocacy agencies, the enforcement of Section 504 is central to its advocacy work.

STATEMENT OF THE CASE

Frances B. Davis, in her 47th year, is an actively employed, duly qualified, licensed practical nurse. Her LPN license, issued by the State of North Carolina, is currently in good standing. (App. 109a, 116a).

Motivated by a "determination to continue her education" (App. 140a, 144a), Ms. Davis applied to the Southeastern Community College, a public community college serving her home town in North Carolina. The community college admitted Ms. Davis in 1973-74 and enrolled her in "the undergraduate College Parallel program, designed"—Petitioner's Brief admits (p. 9)—as preparatory for entrance into the College's Associate Degree Nursing Program." (Findings 2, 4). Ms. Davis paid her tuition in the College Parallel program and successfully completed the course work. (App.135a).

In March of 1974, in the course of her application for

admission to the Associate Degree Nursing Program, the college made inquiry into Ms. Davis' handicap. Ms. Davis had "a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear." (Finding 7). With a hearing aid, she heard at the "outer limits of normal hearing levels." (App. 124a).[4]

The Executive Director of the North Carolina Board of Nursing responded to an inquiry from the college and, apparently, to an answer suggested by the college as well:

> "We concur with your opinion as stated on the telephone, that Mrs. Davis' hearing disability can preclude her being safe for practice in any setting allowed by a license as a RN, or by license as a LPN." (App. 132a).

Not that it *does*, but that it *can*. Though the record does not show whether the Executive Director knew that Ms. Davis was licensed as an LPN or that she had practiced as an LPN, safely, apparently, the Executive Director explicitly eschewed an opinion on Ms. Davis' licensing as an RN:

> "We cannot at this time, predict eligibility or ineligibility, for the licensing examination should Mrs. Davis enroll in, and be allowed to complete the program some several years hence." (App. 138a).

The community college inquired of the Director of Nursing Services at Southeastern General Hospital whether the community hospital would employ Ms. Davis as a registered nurse. The Director of Nursing Services answered:

> "In areas such as long term care, a doctor's office or even industrial, she could do well. I do not believe that

4. The Duke University Medical Center audiologist was not asked by the college for an opinion on whether or how Ms. Davis could function as a nurse or as a student in the nursing program, or for an opinion as to what adjustments or accommodations, if any were necessary, would enable her to function. (App. 128a).

> I can truthfully state that she would not be able to function in any area of nursing with her present determination to continue her education . . .
>
> "I would employ Mrs. Davis in our Skilled Nursing Facility as an R.N. if I had a vacancy . . . we have the New Methodist Home that will be built in the near future that will have positions that I feel she can handle. Mrs. Davis could also handle the night assignment on our Post Partum Units without difficulty after she is registered." (App. 140a, 144a).

Nonetheless, Southeastern Community College excluded Ms. Davis from the Associate Degree Nursing Program solely "by reason of her hearing disability." (Finding 11). The single individualized consideration of Ms. Davis, her competences and the requirements of the Program and the profession—that of the Director of Nursing Services—was ignored and she was excluded, on the basis of a blanket judgment that a person with hearing loss could not, as such, be a nurse.

The District Court found that judgment unexceptional and, under Section 504, permissible. The record before the Court established that Ms. Davis was academically qualified for admission to the nursing program. (App. 47a, 114a). The record showed that, with the supervision of an instructor, Ms. Davis could achieve all skill levels in the clinical aspects of the nursing program, only the college was not prepared nor was it resolved to provide such supervision. (App. 78a, 79a).

The Court of Appeals reversed. The Court held that Southeastern Community College must consider Ms. Davis' application for the nursing program without regard to her hearing disability and if otherwise she is qualified, it may then consider the effect, if any, of her handicap but in doing so must determine whether a modification or adjustment, if any is necessary, can be made in the program to accommodate her. Having thus defined the structure of inquiry it found required to comport with Section 504, the Court of Appeals remanded. The Court en banc denied the petition for rehearing.

SUMMARY OF ARGUMENT

I. This case implicating one community college and presenting to this Court but one example of the historic sterotype and prejudice disabled people have been subject to over the decades, tests whether disabled people will be admitted to equal citizenship as the Congress has mandated. By enacting Section 504 the Congress has done no more and no less than to include disabled persons as equal citizens. That mandate requires not only that Ms. Davis have the opportunity to be judged upon her qualifications and performance, and not stereotypical notions of disability, but requires also that four million disabled children be admitted to education appropriate to their needs along with their peers; that the nine million unemployed disabled adults have opportunity for the education and training prerequisite to their productive employment; that qualified disabled people be permitted to fairly compete for jobs; that thirteen million disabled persons have full access to public transportation they can use; and that developmentally disabled persons have effective services in the least separate, most integrated community setting.

The exclusion and isolation of disabled people from the life of the nation was fully before the 93rd Congress and that Congress in the exercise of its powers under Section 5 of the Fourteenth Amendment enacted Section 504 of the Rehabilitation Act of 1973—a Civil Rights Act for the disabled—so that disabled people, like Ms. Davis, through their own enforcement efforts would remedy past discrimination and secure equal opportunity.

The legislative notice of the historical prejudice and stereotype, rooted in mistaken and outdated notions of the competence of disabled people and the legislative finding that legal and social judgments based on these notions must be purged, provided the foundation for a series of federal enactments which form the new congressional charter for disabled people. With Section 504 as the keystone, Congress mandated that educational opportunities be opened up to disabled children, 20 U.S.C. Section 1401 *et seq.;* required federal contractors take affirma-

tive action to hire disabled people, 29 U.S.C. Section 793; provided that severely disabled people receive priority attention in rehabilitation programs; 29 U.S.C. Section 701 *et seq.;* that developmentally disabled people receive adequate habilitation services in the community and that they be protected in the exercise of their rights, 42 U.S.C. Section 6001 *et seq.* At the same time the Congress acted to eliminate physical and architectural barriers, 29 U.S.C. Section 792, and make public transportation fully accessible to disabled persons, 49 U.S.C. Section 1612(a).

These enactments and the legislative record on which they were based informed the meaning and purpose of Section 504 as interpreted by the Court below.

II. The Circuit Court below correctly interpreted Section 504 and correctly structured the inquiry necessary for the district court to enforce Section 504 and the underlying principle of equal protection embodied in the statute. The Circuit Court held that two inquiries in proper sequence are necessary to the common sense and legislatively intended application of Section 504 to this case. Consistent with Section 504 and the HEW Regulation, 45 C.F.R. Part 84, the threshold inquiry into Ms. Davis' qualification for admission to the nursing program must be whether she "meets the academic and technical standards requisite to admission or participation" Section 84.3(k)(3), without reference to her disability. Then if otherwise qualified, without regard to handicap, a second inquiry takes place concerning the necessity of modification of academic requirements which may be discriminatory and not essential to the program of nursing instruction.

This simple two tier inquiry, first focussing on the individual's qualification without regard to disability and secondly on the modification of general requirements, which upon individualized determination may be found to be discriminatory, is the process required to avoid the class judgments, which foster and preserve the stereotypes repugnant to the policy of all civil rights legislation. *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702 (1978); *Griggs v. Duke Power Co.,*

401 U.S. 424, 431, 436 (1971); *Lau v. Nichols,* 414 U.S. 563, 566 (1974).

On the record of this case the college disqualified Ms. Davis solely because of her hearing disability, without regard for her technical and academic qualifications and without taking into account the facts to make a proper determination whether modifications were required or not. On the facts presented here, it is not clear that if the process directed by the Circuit Court were adhered to whether any modification of the nursing program would follow. If such modification is necessary, Section 504 and the Regulation require that the college modify its program to accommodate Ms. Davis and extend equal opportunity to her.

III. The HEW Regulation requiring that programs and services be different in form if necessary to be effective for disabled people and that programs be modified if possible to accommodate disabled people is true to the Congressional purpose and intent of Section 504 and consistent with this Court's teachings that identical treatment of all people without regard to real differences, such as disability, does not extend meaningful equality to them. *Lau v. Nichols,* 414 U.S. 563, 566 (1974); *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971).

The Section 504 requirement of different or modified programs, as *Lau* and *Griggs* suggest, is not properly characterized as special or preferential treatment. Variability—taking into account difference—to achieve functional equality is a common characteristic of most programs and services including education. Higher education, like elementary and secondary education, is individualized and individualizing to a significant degree. Where historic stereotypes and prejudices create a barrier to individualized treatment of members of a class thus foreclosing functional equality to a class of people, it is inherent in the enforcement of the Congressional non-discrimination mandate to remove that barrier. Such enforcement to be real requires in certain cases modification and accommodation so that the nursing education or other program offered be "one all seekers can use." *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971).

To allow less would be to relegate Ms. Davis and the disabled population of this country to the pre-*Lau* status of the Chinese children in the San Francisco schools, or to the superficial equality mutually proferred by the fabled stork and the fox. *Id.*

To characterize the modifications required by Section 504 as "affirmative action" is misleading on the facts of this case and not helpful to the analysis of the correct interpretation and enforcement of Section 504. As in other civil rights matters, the non-discrimination required by Section 504 is seldom achieved by inertia and inaction. Thus, the Courts of Appeals which have given plenary consideration to Section 504 have characterized it and its regulations as creating "an affirmative duty on federal recipients." See, *Lloyd v. Regional Transit Authority,* 548 F.2d 1277, 1283 (7th Cir. 1977); *United Handicapped Federation v. Andre,* 558 F.2d 413, 415 (8th Cir. 1977). The Fourth Circuit's suggestion that the district court "give close attention, on remand, to the regulations [addressing affirmative steps on modification and auxiliary aids]", 574 F.2d at 1162, is in accord with the Seventh and Eighth Circuit opinions, with the teachings of *Lau* and *Griggs* and the common sense understanding of the higher education establishment who write for the guidance of college and university administrators. They say,

> ". . . in practice Section 504 requires something between what is ordinarily defined as 'affirmative action' and 'non-discrimination' since in the process of ensuring non-discrimination, it requires certain actions beyond mere neutrality. . . ." Biehl, R., *Guide to Section 504 Self-Evaluation for Colleges and Universities,* Wash., D.C. National Association of College and University Business Officers (1978), p.7.

IV. In enacting Section 504, Congress intended that it be effectively enforced and that the equal protection norms it codified be enforced. To that end, the Congress conferred a private right of action on disabled people and required that a judicial remedy be available to them. The intention to create a private right of action is explicit. The Senate Labor and Public Welfare Com-

mittee in 1974 declared Section 504 "would permit a judicial remedy through private action". S. Rep. 93-1297 at 40141; 1974 U.S. Code Cong. & Admin. News, 6390-91. That Section 504 gives rise to a private cause of action was recognized by this Court in *Campbell v. Kruse,* 434 U.S. 808 (1977). The intent that judicial remedies be available was confirmed and strengthened by the 1978 Amendments to Title V allowing attorney's fees awards for securing judicial remedies under Section 504. In the unambiguous words of the Conference Committee reporting the 1978 Amendments:

> "The amendment adopted by the Committee would help assure that handicapped individuals will have access to the judicial process in order to assert their rights under title V." Cong. Rec. S19000 (October 14, 1978).

ARGUMENT

I. Section 504 Was Enacted By Congress to Implement the Fourteenth Amendment and to Include Disabled People as Equal Citizens of the United States

Section 504 was enacted by the Congress in the exercise of its powers under Section 5 of the Fourteenth Amendment to enforce the Equal Protection of the Laws. Compare *Katzenbach v. Morgan,* 384 U.S. 641, 648, 650 (1966); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976); Cohen, "Congressional Power to Interpret Due Process and Equal Protection," 27 *Stan. L. Rev.* 603 (1975).

The Congress considered Section 504 and advanced it to enactment over a period of two years. Introduced originally by Senators Humphrey and Percy and Congressman Vanik as an amendment to the Civil Rights Acts of 1964, 118 *Cong. Rec.* S525 (January 20, 1972); 117 *Cong. Rec.* H45974 (December 9, 1971), Section 504 came to be co-sponsored by sixty members of the House and twenty Senators, 118 *Cong. Rec.* S9495 (March 22, 1972), and was ultimately incorporated into the first major revision of the Rehabilitation Act since its enactment in 1920.[5] 118 *Cong. Rec.* S32310 (September 26, 1972), 119 *Cong. Rec.* H1531 (March 8, 1973). With the rest of Title V and the entire Rehabilitation Act of 1973, Section 504 was adopted unanimously by the Congress after two presidential

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5. The federal vocational rehabilitation program is the nation's oldest human service program and one of the oldest federal-state grant-in-aid programs. Congressional interest in "soldier rehabilitation" after World War I and rehabilitation of the industrially disabled led to passage of the Smith-Fess Act (P. L. 66-236) in 1920. In the 58 years since the start of the program the basic concept—full participation of disabled people in the life of the nation—has remained intact. The growth in the program over the years has been continuous with enlargements in scope and effectiveness in legislative authority in 1943, 1954, 1965, 1968, 1973 and 1978. S. Rep. 1135, 92d Cong., 2d Sess. 9 (1972); S. Rep. 1297, 93d Cong., 2d Sess. 25 (1974); H. Rep. 1149, 95th Cong., 2d Sess. 2 (1978). See also, Levitan, S. and Taggart, R., *Jobs for the Disabled,* Johns Hopkins Univ. Press, Baltimore 1977, 27-48. Coverage has expanded from industrially injured physically handi-

vetoes concerning executive and Congressional differences unrelated to Title V. 1973 *Congressional Quarterly Almanac* 557 et seq.[6]

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capped persons to physically disabled, mentally disabled and developmentally disabled persons. Services have expanded from simple vocational training and job placement to a virtually unlimited range of services (including college education) designed to enable the handicapped individual to work, be productive in a sheltered and structured setting or live independently. The accomplishments of the program match its growth. In 1977 a total of 291,202 handicapped persons were rehabilitated. Of this number 127,522 or 44 percent were severely disabled, a group receiving priority under the Act. H. Rep. 1149, 95th Cong., 2d Sess. 2 (1978). With the Comprehensive Rehabilitation Amendments of 1978 the expansion of the program will continue. The Congressional Budget Office estimates the authorization levels and net cost of the rehabilitation program to be over $5 billion for 1979-1983. H. Rep. 1149, 95th Cong., 2d Sess. 30 (1978). The increased priority for service funds for the handicapped and the enforcement of Section 504 is not mere coincidence. As the House Committee on Education and Labor noted in reporting the 1978 Amendment:

> "the expectations of handicapped persons for employment and *equal opportunity* are running high. This is partially in response to Federal initiatives on Section 504 and the recent White House Conference on Handicapped Individuals. If those expectations are to be realized higher authorizations will be necessary. . . ." H. Rep. 1149, 95th Cong., 2d Sess. 11 (1978) (emphasis supplied).

6. The Rehabilitation Act Amendments of 1974 which amended the definition of "handicapped individual" for purposes of Section 504 and the other provisions of Title V were also vetoed and the Congress overrode the veto with near unanimity, 398 to 7 in the House, 90 to 1 in the Senate. S. Rep. 1297, 93d Cong., 2d Sess. 1 (1974).

The Comprehensive Rehabilitation Amendments of 1978, P. L. 95-602 amend Title V to permit courts to award attorney's fees in judicial actions to enforce Title V, make available the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 and authorize the Secretary of Health, Education and Welfare to provide assistance in removal of communication, architectural and transportation barriers (Sec. 120). The Congress again acted with near unanimity, 365 to 2 in the House, 124 *Cong. Rec.* H13476 (Oct. 14, 1978), and 81 to 1 in the Senate, 124 *Cong. Rec.* S15673 (Sept. 21, 1978).

Tracking virtually verbatim the plenary provision of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, the Congress articulated three related prohibitions as the positive law of the land:

> "No otherwise qualified handicapped individual in the United States, as defined in §706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Several states' Attorneys General purport to find "no particular legislative history" to Section 504. But as Mr. Justice Holmes adjured, where Congress "has intimated its will however indirectly that will should be recognized and obeyed. . . . [I]t is not adequate discharge of duty for the courts to say: We see what you are driving at but you have not said it, and therefore we shall go on as before." *Johnson v. United States,* 164 F. 30, 32 (1st Cir. 1908); where the purpose of Congress is clear "that purpose must be upheld." *Hudson Distributors, Inc. v. Eli Lilly and Co.,* 377 U.S. 386, 395 (1964). In Section 504 the Congress did more than hint; as the legislative history of Section 504 itself and the history of closely related enactments show, the Congress acted with a particular clarity.

Each prime sponsor of Section 504 announced the intention to extend equal protection of the laws to handicapped Americans. E.g., Senator Humphrey:

> "I introduce . . . a bill . . . to insure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving federal financial assistance." 118 *Cong. Rec.* S525 (January 20, 1972).

and

> "It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced." 118 *Cong. Rec.* S9495 (March 22, 1972).

Congressman Vanik:

> "In an effort to provide increased assistance and equal opportunity for the handicapped of our Nation I am today introducing legislation to provide equal treatment of the handicapped in all programs which receive Federal assistance." 117 *Cong. Rec.* H45974 (December 9, 1971).

Relevant committee reports are to the same effect and are entitled to be carefully considered by the courts. *Red Lion Broadcasting Co., Inc. v. FCC,* 395 U.S. 367, 380-81 (1969).

> "Section 504 was enacted to prevent discrimination against all handicapped individuals . . . in relation to federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided program.
>
> "The section . . . constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." S. Rep. 93-1297, pp. 38, 39-40; 1974 U.S. Code Cong. & Admin. News 6389, 6390-91.

"These *are* people" Senator Humphrey said "who *can* and must be helped to help themselves. That this is their constitutional right is clearly affirmed in a number of recent decisions in various judicial jurisdictions." 118 *Cong. Rec.* S525 (January 20, 1972) (emphasis supplied).

The plenary purpose of the Congress was to open American life to disabled people, to include them in the workings of the society. The evil the statute was intended to remedy, *Rector of Holy Trinity Church v. United States,* 143 U.S. 457, 463, 465 (1892), was "the profound indignity and despair of isolation, discrimination and maltreatment." 118 *Cong. Rec.* S9495 (March 22, 1972).

> "Today the handicapped are generally a hidden population. . . . The handicapped live and struggle among us, often shunted aside, hidden and ignored." 117 *Cong. Rec.* H45974 (December 9, 1971).
>
> "[T]he fundamental fact that one confronts is . . . the segregation of millions of Americans from society—suggesting a disturbing viewpoint that these people are not only forgotten but perhaps expendable. . . . 118 *Cong. Rec.* S9495 (March 22, 1972).
>
> "The opportunities provided by the government almost always exclude the handicapped. . . . 117 *Cong. Rec.* H45975 (December 9, 1971).

The Congress understood full well that the roots of this isolation lay in historical prejudice and stereotype, in mistaken and outdated notions of the competence of severely disabled people; the Congress understood that its rectification required both the elimination of the patterns and institutions of segregation and the individualized address of disabled people and the accommodation of their talents. In Judge Skelly Wright's gentle phrase, Section 504, like the Equal Protection Clause, wherever it reaches,[7] is intended to eliminate "the arbitrary quality of thoughtlessness." *Hobson v. Hansen,* 269 F.Supp. 401, 497 (D.D.C. 1967), aff'd sub nom. *Smuck v. Hobson,* 408 F.2d 175 (D.C.Cir.1969). As Senator Humphrey said:

> "This bill correctly emphasizes the need to serve more severely handicapped individuals, to make services responsive to individual needs, and to make every effort to enable handicapped persons to lead a productive and financially independent life. 118 *Cong. Rec.* S32310 (September 26, 1972).
>
> "These people have the right to live, to work to the best of their ability—to know the dignity to which every human being is entitled." 118 *Cong. Rec.* S525 (January 20, 1972).

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7. There is no dispute in this case but that Southeastern Community College receives federal financial assistance and is bound by the strictures of Section 504.

The Congressional intention to extend equal protection of the laws to handicapped Americans, so manifest in the legislative history of the rehabilitation enactments over the last seven years, was inserted into the Declaration of Purpose of the Rehabilitation Act by the 1978 Amendments to the Act.[8]

The same Congress which considered, enacted and amended Section 504 enacted a series of related statutes premised upon the same Congressional judgments about the competences of disabled people and the necessity of individualized consideration of them. Throughout these enactments the Congress acted to purge historic stereotypes of disabled people, to bar the prejudice which arises from them, to mandate that historic patterns of segregation and exclusion be reversed, that services be extended to disabled people and that they be included in the national life.

In the Rehabilitation Act of 1973, the Congress extended greatly the reach of vocational rehabilitation services, requiring that priority in vocational rehabilitation be given to "those with the most severe handicaps." The legislative fact behind that enactment was not only that severely disabled people can learn but with "multiple services over an extended period of time" 29 U.S.C. Section 706(12), they can learn productive skills and engage in gainful employment. The same Congress, in Section 503 of the Rehabilitation Act of 1973, required government contractors to take affirmative action to employ disabled people including severely disabled people, 29 U.S.C. Section 793. The 1973 Act embodies the Congressional objective that vocational rehabilitation services (including higher education[9]) be

8. P. L. 95-602, 92 Stat. 2955, Sec. 122(a) amends the Declaration of Purpose, 29 U.S.C. Section 702 to read:

> "The purpose of this Act is to develop and implement, through research, training, services, and the *guarantee of equal opportunity*, comprehensive and coordinated programs of vocational rehabilitation and independent living." 92 Stat. 2984. (emphasis supplied)

9. Education in colleges and universities is a vocational rehabilitation service. 29 U.S.C. Section 723(a)(3). In fiscal year 1975, 35% of the persons rehabilitated received assistance at colleges and universities.

individualized. Each disabled person receiving services is entitled to have an "individualized written rehabilitation program" and to actively participate in its development. 29 U.S.C. Section 722; see, *Scott v. Parham*, 422 F.Supp. 111 (N.D. Ga. 1976).

The Education Acts of 1974 and 1975, 20 U.S.C. Section 1401 *et seq.*, are premised in the same Congressional findings about the need for individualized attention and about the competence of severely disabled people. Both Education Acts adopt the principles of normalization, recognize individualization as a necessary condition of learning, e.g., 20 U.S.C. Section 1412(4), place a priority on services to children with the most severe handicaps, e.g., 20 U.S.C. Section 1412(3); and both state their own integration requirement, based upon the same findings and with similar purposes as Section 504's integration imperative: that, "to the maximum extent appropriate, handicapped children, including children who are in public or private institutions or other care facilities, [shall be] educated with children who are not handicapped, . . ." 20 U.S.C. Section 1412(5).[10]

Gollay, E., Bennett, A., *The College Guide for Students with Disabilities* (Cambridge, Mass. Abt Publication 1976, p. 45). The importance of higher education in the rehabilitation scheme is well known. Careful studies of occupational adjustment of disabled Vietnam veterans indicate that education rather than disability status had most effect on employment success. Wilson T., et al. *Disabled Veterans of the Vietnam Era: Employment Problems and Programs* (Alexandria Va. Human Resources Research Organization 1974) pp. 66-70. This confirms the World War II experience where disability reduced the earnings of the college educated veterans by only 5 percent compared with 30 percent for high school graduates. Eggertsson, T., *Economic Aspects of Higher Education Taken Under the World War II G.I. Bill of Rights* (Columbus, Ohio State U. 1972), tables 17 and 20. These studies are reviewed by Levitan and Taggart, who conclude, "There is no doubt that if these relationships hold true in the future, placing a priority on higher education [for disabled people] is sound policy. Levitan S. and Taggart, R., *Jobs for the Disabled* (Baltimore, Md., Johns Hopkins U. Press 1977) pp. 55-58.

10. The Congressional purpose to pierce the stereotype that severely disabled children and young adults cannot be integrated into normalized settings is evident throughout the legislative history. *See* 121 *Cong. Rec.* S10969 (remarks of Sen. Randolph); *id.* at S10961

Congress contemporaneously enacted the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, 42 U.S.C. Section 6001 *et seq.* containing a bill of rights for persons with developmental disabilities, including minimum standards for services and habilitation binding on both the federal government and the states, 42 U.S.C. Section 6010, requiring individualized service plans for developmentally disabled persons, 42 U.S.C. Section 6011; and establishing the protection and advocacy agencies, among the *amici* before this Court. The legislative history of the Developmental Disabilities Assistance and Bill of Rights Act clearly indicated that the rights enumerated including the right to services "designed to maximize the developmental potential of the person", 42 U.S.C. Section 6010(2) "should be protected and assured by the Congress and the courts." H.R. Conf. Rep. No. 94-473, 94th Cong., 1st Sess. 42; (1975); U.S. Code Cong. & Admin. News 919, 961.

The Congressional resolve to end exclusion of disabled people from the life of the community and the education and jobs necessary to participate fully in the community is most evident in the enactments mandating equal access to public places and public transportation. Starting with the Architectural Barriers Act of 1968, 82 Stat. 718, 42 U.S.C. Section 4151, and later establishing the Architectural and Transportation Barriers Compliance Board, in Title V of the Rehabilitation Act of 1973, the Congress has made it clear that there will be no federal participation in facilities that are constructed to exclude disabled persons and those that do must be modified to accommodate disabled people.[11]

(remarks of Sen. Stafford); *id.* at S10981 (remarks of Sens. Cranston and Mondale); *id.* at S10977 (remarks of Sen. Dole); *id.* at H11350 (remarks of Rep. Michel); *id.* at H11351 (remarks of Rep. Daniels).

11. The Executive branch has adopted the Congressional mandate as its own. President Carter in his supplemental message on the State of the Union to the Congress, January 25, 1979, states:

> "For Americans with physical disabilities, this year will result in continued improvements in their accessibility to many opportunities those of us who are not disabled take for granted—education opportunities, employment opportunities, and greater access to public facilities and services. We will make further progress in removing obstacles that impede and discriminate against our disabled community. If our Nation is to remove the barriers of discrimination in our society, the Federal Government must serve as a model in the successful removal of physical and psychological barriers thrown in the way of our Nation's disabled. The Section 504 Regulations issued by the Department of Health, Education and Welfare provide a basis for the Federal Government to lead the way in insuring the rights of the handicapped." 125 *Cong. Rec.* H295 (H. Doc. 96-44) 1979 U. S. Code Cong. and Admin. News 36-37.

In 1970 and four times since (once in Section 504), the Congress has declared "the national policy that elderly and handicapped persons have the same rights as other persons to utilize mass transportation facilities and services" and "that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured . . . ." 49 U.S.C. Section 1612(a).[12]

These enactments and the legislative record on which they were based, see e.g. H. R. Rep. No. 93-244, S. Rep. No. 93-318, H. R. Conf. Rep. No. 93-500, S. Conf. Rep. No. 93-391, 1973 U.S. Code Cong. & Admin. News 2076 et seq. (Rehabilitation Act of 1973), H. R. Rep. No. 93-805, S. Conf. Rep. No. 93-1026, 1974 U.S. Code Cong. & Admin. News 4093 et seq. (Education Amendments of 1974), S. Rep. No. 94-168, S. Conf. Rep. No. 94-455, 1975 U.S. Code Cong. & Admin. News 1425 et seq. (Education for All Handicapped Children Act of 1975), informed the purpose and the meaning of Section 504. Together these enactments, Section 504 being their keystone, bespeak a common purpose and a new Congressional charter for disab'ed people. As the Congress put it in the White House Conference on Handicapped Individuals Act, Section 301(6), 29 U.S.C. Section 701n, enacted December 7, 1974:

12. To the same effect see 23 U.S.C. Section 142 note; Department of Transportation Appropriations Act of 1975, 88 Stat. 781; Federal Aid Highway Act of 1973 Section 165(b), 87 Stat. 282; Federal Aid Highway Act Amendments of 1974, 88 Stat. 2282.

> "The Congress finds that . . . it is essential . . . to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working and service patterns be held as the final objective."

To advance and to secure this objective the Congress enacted Section 504. To this very purpose the Court of Appeals below properly applied it.

In enacting Section 504 the Congress has done no more and no less than to include disabled people as equal citizens. As Professor Karst has written:

> "The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who 'belongs.' Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a non-participant."

K. Karst, The Supreme Court, 1976 Term—Foreword: "Equal Citizenship Under the Fourteenth Amendment," 91 *Harv. L. Rev.* 1, 6 (1977). This principle informed the judgment and order of the Court of Appeals below, as it activates Section 504 itself, and requires that they be affirmed here.

II. The Court of Appeals Correctly Structured and Defined the Inquiry Necessary to Comport With Section 504

In directing the District Court to inquire, first, whether Frances B. Davis was qualified for admission to the nursing program without regard to her hearing disability and, second, if otherwise she is qualified then to inquire whether modification or adjustment, if any is necessary to accommodate her, can be made in the program without altering its essentials, the Court of Appeals was faithful to Section 504, to the HEW Regulation, 45 C.F.R. Part 84 et seq. which authoritatively construes and

and implements Section 504[13] and to the underlying principle of equal citizenship which motivate them.

Both the structure and the substance of the inquiry the Fourth Circuit held necessary are familiar and have been commonly applied by this Court in implementing statutory commands to extend equal citizenship. Section 504, like many positive law civil rights enactments, requires in the aspect of implementation here most relevant, individualizing inquiry. For this Court Mr. Justice Stevens in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) wrote:

> "The question . . . is whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer which the language and purpose of the statute command. . . . The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a . . . class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. . . . Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices which classify employees . . . tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Id.* at 708-09.

What is required is to "measure the person for the job and not the person in the abstract." *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (Title VII). See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971) (Title VII); *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (Title VI).

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13. Executive Order 11914, 41 Fed. Reg. 17871 (April 28, 1976), confided to the Department of Health, Education and Welfare the authority and the duty to establish guidelines for interpreting Section 504 for all federal departments.

The HEW Regulation under 504 chooses, as it must, precisely a structure of inquiry calculated to evoke individualized determinations and to contain and forestall the dominance of stereotype. The Regulation Section 84.42(b)(4) provides:

> "[a recipient of federal financial assistance] may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation."

The first inquiry thus is whether a person "meets the academic and technical standards requisite to admission or participation," Section 84.3(k)(3). This inquiry is to be conducted without reference to the person's disability.[14] If otherwise qualified, by the common academic and technical standards without regard to handicap, then the second inquiry is in point, namely whether

> "Modifications to its academic requirements . . . are necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program instruction being pursued by such student or to any directly related licensing requirements will not be regarded as discriminatory. . . . Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted." Section 84.44(a).

Surely the Regulation may make the choice it does in structuring the inquiry and withholding consideration of the handicap until the second, modification stage, because doing so is reasonably calculated to avoid the contamination of the initial evaluation of competences and qualifications by stereotype. Purging decisions of such contamination was exactly a purpose of the Congress. Similarly the familiar assignment to the recipient (compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), for example) of the burden of demonstrating that a particular modification is inappropriate because the requirement modified is essential is justified as an effective prophylactic against the contamination of stereotype.

On the record of this case the College failed both requirements. The initial judgment of whether Ms. Davis met academic and technical standards of the program was contaminated by consideration of the handicap; indeed the inquiry was dominated by the proscribed pre-admission inquiry into the handicap.[15] The second inquiry was never really joined, because per se, Ms. Davis was disqualified because of her hearing disability. A fortiori, far from discharging its burden to demonstrate the essentiality of perfect hearing to nursing itself or to learning to nurse, the College's own evidence (e.g., the statements of the Director of Nursing Services of Southeastern General Hospital) showed that Ms. Davis could perform the functions of a nurse and its own testimony showed an effective possible modification to course work (attentive clinical supervision) that did not

14. Petitioner and its *amici* constantly invoke the alarm of the "blind bus driver." On no analysis, does the analogous structure of employment inquiries under 504 justify that alarm. Even with pre-employment inquiry into handicap barred and without necessarily getting to the second stage of inquiry, the asserted "blind bus driver" problem is still resolved at the first stage of inquiry, not because of the person's handicap, but simply because he does not drive. The comparison to Frances Davis, who already performs many nursing duties as an LPN, is so strained as to raise an inference that it is exactly with the stereotypes and not with individualized cases that Petitioner is concerned.

15. Consistent with its general scheme and with the purposes of Section 504, the Regulation, Section 84.42(c), allows pre-admission inquiry into handicap only where a recipient has undertaken to take remedial action under Section 84.6(a) or (b). See Analysis of the Regulation, comments 18 and 29. Here, of course, there was no such undertaking by the College, nor does (or could) the record reflect whether the College had conducted the self-evaluation required by Section 84.6(c) or undertaken the remedial action contemplated therein.

affront any essential requirement (and indeed is likely present in all of nursing education anyway, for all students, disabled or not). The College failed to consider the modification and certainly it failed to carry its burden against the modification.[16]

III. Section 504 Requires, and the Regulation Properly Reflects the Requirement, that a Recipient Modify Its Program or Activity If Such Modification Is Necessary to Accommodate the Disabled Person and to Extend Meaningful Equality to Him

The equality to which one is thus entitled under Section 504 is, of course, not an *identity* of treatment but a functional, meaningful equivalence. "There is", Mr. Justice Frankfurter wrote, "no greater inequality than the equal treatment of unequals." *Dennis v. United States,* 339 U.S. 162, 184 (1950). The difference that a disability constitutes is real, the question is whether it is relevant to the program or function at issue, or whether through a modification, it can be rendered irrelevant. To treat a person with a hearing or other disability identically to a non-disabled person may be to deny him equal treatment. The converse, to treat him variably, according as his disability may require, may be exactly what is necessary to extend a meaningful equality to him.

As this Court wrote construing Title VI and the HEW Regulation thereunder in *Lau v. Nichols,* 414 U.S. 563, 566 (1974):

> [T]here is no equality of treatment merely by providing students with the same facilities, text books, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

16. Indeed, on this undeveloped record, it is uncertain whether any modification is necessary for Ms. Davis, let alone what its parameters may be. See Statement of the Case, *supra.* Hence, the Court of Appeals' remand.

> It seems obvious that the Chinese-speaking minority receives less benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program.

Similarly construing Title VII in *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971), the Chief Justice wrote:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proferred be one all seekers can use.

As to Section 504, the HEW Regulation, reflecting Congress' analysis of the historical problem and its purposes in enacting Section 504, recites:

> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to assure equal opportunity . . . . 42 Fed. Reg. 22676 (May 4, 1977).

The Analysis to the Regulation, Subpart A comment 6, 42 Fed. Reg. 22687 continues:

> "In this context, the term 'equally effective' . . . is intended to encompass the concept of equivalent, as

> opposed to identical, services and to acknowledge the fact that, in order to meet individual needs to the same extent that the corresponding needs of non-handicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary . . . . This standard parallels the one established under title VI of the Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols*, 414 U.S. 563 (1974)."

Whether Section 504's requirement of different or modified programs where necessary constitutes special treatment in any objectionable sense or in any sense at all is doubtful. As *Lau* and *Griggs* and Mr. Justice Frankfurter suggest, to treat a person variably, as his disability may require, is not necessarily to treat him, or any non-disabled person, unequally. Variability,[17] but functional equality, is a common characteristic of our world. Most programs and services (education, including higher education, and the practice of the professions certainly not excepted) are individualizing and individualized to a significant degree.

Indeed petitioner and its *amici*, if guilty of stereotyping disabled people and Ms. Davis and her hearing disability particularly, are no less guilty of stereotyping nursing and nursing education. The fact is that nursing—like most professions—and nursing education—like most education—is a highly variable activity leaving much room for individuation. Quite apart from the testament to the reasonableness, and the common occurrence, of the variation at issue here in Ms. Davis' case which arises from the fact that many deaf and hearing impaired people have completed nursing education and do practice effectively (let

17. While Section 504 requires that programs and services be different in form if necessary to be effective programs or services for disabled people, Section 504 prohibits separate services, unless necessary to be effective. Thus the HEW regulation: "the provision of unnecessarily separate or different services is discriminatory." 42 Fed. Reg. 22687 (May 4, 1977).

alone safely) as nurses,[18] the variation in education and in practice necessary to accommodate hearing-impaired people is well within the norms of variations in nursing.

The picture of nurses spending all their working hours in surgical masks in hospital operating rooms at the beck and call of the verbal commands of physicians. (Pet. Br. p. 9) is as accurate as the notion that all lawyers devote their entire practice to appellate argument, or criminal defense. The nursing profession and nursing education is full of variation and individualization. In addition to the acute hospital care setting that petitioner presents, the nurse may function in a neighborhood health center, group practice, extended care facility, mental health clinic, school or industrial setting. See, e.g. "Nurses Assume Bigger Role in Health Care", New York Times, March 25, 1979, col. 3. The functions and responsibilities in primary care, acute care and long term care vary greatly, as a Committee commissioned by Secretary of Health, Education and Welfare, Elliot Richardson reported:

> "In present practice the utilization of nurses varies extensively. Some are responsible for institutional areas of management and communication, such as inventory and supply, making requisitions for laboratory and other diagnostic and treatment services, routine charting and managing the flow of charts, and making appointments. A study reported by Yankauer, Connelly, and Feldman (*Pediatrics* 45:No. 3, Part II, March 1970) reveals that in pediatric practices nurses engage primarily in technical and clerical tasks along with such patient care activities as giving minor medical advice and information and interpreting instructions.

18. E.g., the Report of the Civil Service Commission (September 1978) showing 156 hearing-impaired nurses and 96 hearing-impaired doctors practicing in the federal government. *Los Angeles Times*, March 26, 1979, page 19, column 1.

Extending the Scope of Nursing Practice, A Report of the Secretary's Committee to Study the Extended Roles for Nurses, U.S. G.P.O., Washington (1971), p. 8.

Even in the hospital setting the nurse's job is varied and individualized. In the real world of nursing,

> ". . . the RNs are managers. We make decisions, keep records, pass medications, and coordinate, teach, and lead staff. Our main responsibility is to see that patients receive the right kind of care. Often that care is given by somebody else. If a patient needs instruction in a two-gram sodium diet, I get a dietitian to come up. If I learn that a patient who has had a leg amputated is being discharged to go home alone to a second-floor apartment, I call in one of the hospital social workers. Most bedside care is done by licensed practical nurses and nursing assistants. At Mother of Mercy no RN ever touched a bedpan." Anderson, P., *Nurse,* New York, St. Martins Press 1978, pp. 26-27.

And the surgical mask may never be worn and rarely seen. *Id.* at 219.

The variation of nurse roles and functions, and the emergence of specialties not only allows for modification and individuation in nurse training but demands it. Changing roles of nursing plus the variety of students applying for admission to schools of nursing (older men, veteran corpsmen, disadvantaged students, licensed practical nurses), Morton, D., Curriculum Design for the 1980's in *Curriculum Relevance in a Changing Health Care System,* New York National League of Nursing, 1975, p. 25, make the modification of program as suggested by the Circuit Court not a special modification for Ms. Davis but a modification as special as is required for nursing students generally.[19]

Whether the modifications required by Section 504 when

19. Similar individuation and variation is common, for example, in transportation, the service at issue in *Lloyd v. Regional Transit*

necessary to include disabled people constitute "affirmative action", and whether if it does, it is objectionable, is in large part a language game indulged by petitioner and its *amici.* As often in analogous civil rights matters, achieving the non-discrimination, the inclusion, the equality of benefit required by Section 504 involves particular positive or affirmative steps. Where overcoming the present effect of the weight and inertia of historic stereotype is the practical task, it is seldom satisfied by inaction. As simply put by Mr. Justice Blackmun (and much simpler to apply in this case than in *Bakke*) "I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. . . . [I]n order to treat some persons equally, we must treat them differently." *Board of Regents v. Bakke,* U.S. , 98 S.Ct. 2733 (1978). The Courts of Appeals which have given plenary consideration to Section 504 have characterized it and its regulations as creating "an affirmative duty on federal grant recipients." See *Lloyd v. Regional Transit Authority,* 548 F. 2d 1277, 1283 (7th Cir. 1977); *United Handicapped Federation v. Andre,* 558 F. 2d 413, 415 (8th Cir. 1977); see also *Halderman v. Pennhurst,* 446 F. Supp. 1295, 1323 (E.D. Pa. 1977). The HEW 504 Regulation and this Court in *Lau* and *Griggs* characterize the requisite action in the fashion recited above.

Among the clearest analyses of what is in point here and what is merely smoke and mirrors is the analysis of Section 504 by one of petitioner's *amici,* the American Council on Education, not in their Briefs to this Court but in one of the publications they have sponsored: Biehl, R., *Guide to the Section 504*

Authority, 548 F.2d 1277 (7th Cir. 1977). The height and width of doors to buses and of seats on them was chosen to accommodate a great diversity of individual sizes and shapes, girths and gaits among people. The claim of disabled people was that the additional reach necessary to accommodate them was no greater than the range already accommodated. They sought only equally individuated and accommodating buses. If the technology of buses would support such additional accommodation there, disabled people argued, Section 504 and the Urban Mass Transportation Act required it.

Self-Evaluation for Colleges and Universities, Washington, D.C. National Association of College and University Business Officers (1978).[20] The *Guide* states:

> "It should be pointed out that section 504 is not an 'affirmative action' statute and requires no goals or timetables.[21] There is no requirement that a college or university employ more (or attempt to employ more) qualified handicapped persons, or admit more (or attempt to admit more) qualified handicapped students. Section 504 is a 'nondiscrimination' statute that prohibits discrimination against existing employees, students, and applicants for employment or admission. However, in practice section 504 requires something between what is ordinarily defined as 'affirmative action' and 'nondiscrimination,' since, in the process of ensuring nondiscrimination, it requires certain actions beyond mere neutrality to be taken regardless of the presence of handicapped persons who might benefit. This principle of advance preparation to ensure nondiscrimination appears to go beyond the traditional concept of *laissez faire* nondiscrimination." *Guide,* p. 7.

That formulation offered by the college establishment and approved by the Office of Civil Rights as "an integral part of the Department of Health, Education and Welfare's effort to bring the best available technical assistance to recipients. . . .", *Guide* v, comports with the suggestion of the Circuit Court on affirmative relief.

IV. Section 504 Confers A Private Right of Action on Disabled People and Requires that A Judicial Remedy Be Available to Them

Throughout the legislative history of Section 504 the Congress emphasized that it attached the highest value to securing equal citizenship for disabled people and that it intended that Section 504 be effectively enforced. For example, in welcoming the addition of co-sponsors, Senator Humphrey said "It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced." 118 *Cong. Rec.* S9495 (March 22, 1972). Amending the definition of handicapped individual in Title V, the Senate Labor and Public Welfare Committee underscored its intention to reach all of the "many forms of potential discrimination" against disabled people. S. Rep. 93-1297 at p. 38; 1974 U.S. Code Cong. &

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20. This document published under a subcontract with American Council on Education is part of a larger technical assistance project.

The sponsorship of the American Council on Education in developing these 504 self-evaluation guidelines is noted on the inside cover of the *Guide.* The document is only one part of a sizable Department of Health, Education and Welfare technical assistance contract providing funds to the American Council for "Development of Training Materials, Training Workshops and Information Services to Assist Colleges and Universities in Providing Access for Handicapped Students and Employees." The Congress in the 1978 Amendments to Title V has authorized continued assistance to recipients to comply with Section 504, P. L. 95-602, sec. 120(a), 92 Stat. 2983, 29 U.S.C. Section 794b, and has authorized additional resources for colleges and other recipients to accommodate disabled persons. E.g., reader services for the blind, 92 Stat. 2975, 29 U.S.C. Section 777d; interpreter services for the deaf, 92 Stat. 2976, 29 U.S.C. Section 777e.

21. Section 504 and the HEW Regulation do appear to implicate "affirmative action" in its traditional sense of goals and timetables, see e.g., *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 311 F. Supp. 1002, 1009 (E. D. Pa. 1970), *aff'd* 442 F. 2d 159 (3rd Cir. 1971), *cert. denied* 404 U.S. 854 (1971), at three points, none of which are involved in this case. The Regulation, at Section 84.6(a), requires "remedial action" to overcome the effects of any discrimination found by the Director; at Section 84.6(b), it authorizes "voluntary action . . . to overcome the effects of conditions that resulted in limited participation . . . by handicapped persons"; and, at Section 84.6 (c), it requires a self-evaluation and "remedial steps to eliminate the effects of any discrimination that resulted from adherence to policies and practices." See Analysis to the Regulation, comments 9 and 10. The Congress said clearly that "where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." S. Rep. 93-1297 at page 39; 1974 Code Cong. & Admin. News 6390.

Admin. News 6389. Section 504, the Committee said, "is clearly mandatory in form" and explicitly, choosing words which have very particular meaning, the Committee declared Section 504 "would permit a judicial remedy through a private action." S. Rep. 93-1297 at p. 40-41; 1974 U.S. Code Cong. & Admin. News 6390-91.

The 1978 Amendments to Title V do not limit access to the courts as Petitioner suggests (Pet. Br. 60) but confirm the explicit legislative direction that judicial remedy (not judicial review) is available to enforce Section 504. The confirmation of legislative intent to authorize a private right of action is not found in the random remarks of Senators which "contribute little if anything to the search for legislative intent" (Pet. Br. 63) but is found in the explanation of the sponsor of the Amendment, Senator Cranston[22] and the well considered views of the Conference Committee.

In introducing Section 505(b) Senator Cranston said,

> ". . . the rights extended to handicapped individuals under title V of the Rehabilitation Act of 1973 . . . are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance.
>
> "To date we have permitted certain private enforcement of title V and yet we have not provided the means by which such private rights of action are meaningful. This amendment—providing attorneys' fees . . . will go a long way toward assisting long neglected Americans—handicapped individuals—in their full and equal share of the rights to which they are entitled." 124 *Cong. Rec.* S15591 (September 20, 1978).

Senator Cranston's language and intention were adopted by the Conference Committee. Senator Stafford, the ranking member of the Subcommittee on the Handicapped reporting to the Senate on the Conference bill stated:

> "The Amendment adopted by the Committee would help assure that handicapped individuals will have access to the judicial process in order to assert their rights under title V." 124 *Cong. Rec.* S19000 (October 14, 1978).

That the Congress intended and did create a private right of action is now beyond dispute. The legislative intent is explicit. This Court in *Campbell v. Kruse,* 434 U.S. 808 (1977) recognized the existence of a private cause of action by remanding to the district court "with directions to decide the claim based on the federal statute, Section 504 of the Federal Rehabilitation Act of 1973." Cf. *Lau v. Nichols,* 414 U.S. 563 (1974); *Board of Regents v. Bakke,* U.S. , 98 S. Ct. 2733 (1978).

Since this is an action against officials acting under color of state statute, custom, and usage, it arises under 42 U.S.C. Section 1983 and falls within the exceptions recognized in *Cannon v. University of Chicago,* 559 F. 2d 1063, 1083 (7th Cir. 1976), *cert. granted* U.S. , 98 S. Ct. 3142 (1978).[23]

It is perhaps the clarity of the legislative intention to create a private cause of action under Section 504 that leads petitioner to attempt to transmogrify a judicial remedy into a review of administrative proceedings. (Pet. Br. 63). While urging that Ms. Davis be required to exhaust administrative remedies, petitioner made no showing that any administrative remedy exists. In fact it is agreed that "the ultimate sanction . . . would be termination

22. The statements of a bill's sponsor as to legislative purpose are entitled to great weight. *National Woodwork Mfrs. Ass'n. v. N.L.R.B.* 386 U. S. 612, 640 (1967). A statement on the floor by a sponsor following his introduction of an amendment which is subsequently enacted is "clearly probative of a legislative judgment." *Simpson v. United States,* 435 U. S. 6, , 98 S. Ct. 909, 913 (1978).

23. The ambiguities in the legislative history implicated in *Cannon* do not exist in the 504 history. Compare comments of Rep. Railsback, 122 *Cong. Rec.* H12153, H12161 (Oct. 1, 1976) with Senator Cranston's remarks *supra.*

of federal funding [to the college]." (Pet. Br. 65). Hardly a remedial result for Ms. Davis.

The Circuit Court properly reserved any possible considerations of exhaustion or primary jurisdiction for the district court on remand. To the extent those doctrines have been developed in cases where administrative proceedings are provided for by statute, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, (1938), *McKart v. United States*, 395 U.S. 192 (1969), they are inapposite where no administrative proceeding to grant individual remedies is mandated by Congress, and where in fact the legislative history shows Congress intended judicial remedies.

CONCLUSION

For the above stated reasons the judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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